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Case No. 84940-4

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SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG
Respondent / Cross-Petitioner,

v.

THURSTON COUNTY
Petitioner / Cross-Respondent.

ANSWER TO AMICUS BRIEFS OF THE WASHINGTON
DEFENDER ASSOCIATION, THE WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
AND THE AMERICAN CIVIL LIBERTIES UNION

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David Koenig submits the following answer to the amicus briefs filed by the Washington Defender Association (WDA) and the Washington Association of Criminal Defense Lawyers (“*WDA Br.*”), and the American Civil Liberties Union (ACLU) (“*ACLU Br.*”).

A. The order to seal the *Lerud* court file is irrelevant. That order does *not* affect Koenig’s request to the Prosecutor.

Ignoring both the facts and the applicable law, the ACLU and WDA argue that the Court should decide this case based on the irrelevant fact that the VIS and SSOSA evaluation were sealed in the *Lerud* court file *after* Koenig made his PRA request for those records. The ACLU erroneously argues that the order to seal the court file establishes that the VIS and SSOSA are private for purposes of RCW 42.56.240(1). *ACLU Br.* at 2, 10-18. Both amici erroneously suggest that Koenig should be required to move to unseal the *Lerud* court file. *ACLU Br.* at 20; *WDA Br.* at 3. These arguments are meritless for several reasons.

1. The VIS and SSOSA evaluation in the Court file were *improperly sealed after* Koenig made his PRA request.

WDA erroneously assumes that the SSOSA evaluation in the court file was sealed before Koenig made his PRA request, and those amici mischaracterize Koenig’s PRA request as an “end-run” around the order to seal the court file. *WDA Br.* at 4, 9-10. **In fact, the prosecutor moved to seal the *Lerud* file after Koenig made his PRA request.** CP 37, 59, 62.

The prosecutor's motion was an improper "end-run" around the PRA.

Second, the ACLU erroneously assumes that the order to seal the *Lerud* file complied with *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). *ACLU Br.* at 7 n.3, 19. **The record clearly shows that the superior court did not address or apply the *Ishikawa* factors when it sealed the *Lerud* court file.** CP 44-50. The ACLU is simply wrong.

- 2. The County stipulated that the order to seal the *Lerud* court file is *not* binding on Koenig and that it does *not* restrict disclosure of either the VIS or the SSOSA evaluation by the prosecutor under the PRA.**

It is undisputed that the prosecutor obtained an invalid, ex parte order to seal the *Lerud* file after Koenig made his PRA request. In the trial court, the County argued that the order to seal the file prevented the prosecutor from providing the same records under the PRA. CP 173-175. Koenig documented the County's misconduct in obtaining the defective ex parte order, and explained why the order had no effect on Koenig's PRA request. CP 84-89; 202-03. The trial court mentioned the order to seal the *Lerud* court file, but the court did not accept the County's arguments regarding the effectiveness of that order. CP 244-250. At that point the County *stipulated* that the order is not binding on Koenig and does not restrict disclosure of records under the PRA. CP 253.

The ACLU and WDA have simply ignored the parties' stipulation.

But that stipulation is binding on the County, and the arguments presented by amici—which entirely rely on the order to seal the *Lerud* file—must be rejected. This Court does not consider issues raised only by amici. *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007).

3. Even if the County had not stipulated that the order to seal the *Lerud* file was not binding, that order would have no effect on Koenig’s PRA request.

Leaving aside the fact of the County’s stipulation, recent decisions of this Court confirm that an order to seal court records — even an order that complies with *Ishikawa, supra* — has no effect on a PRA request for the same records from a non-judicial agency. For starters, Koenig was not made a party to the *Lerud* case, and hence no valid order to enjoin the disclosure of public records could have been issued in that case. *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 836-37, 231 P.3d 191 (2010).

More importantly, the ACLU and WDA have failed to address *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), which is directly on point. In *Yakima County*, a newspaper sought access to billing records of attorneys appointed to represent two death penalty defendants. The billing records in possession of the superior court had been sealed, and the newspaper initially sought to intervene in the criminal case and unseal the court records. 170 Wn.2d at 781-83. The newspaper later decided to obtain the billing records from the County

under the PRA. The County asserted that the billing records were sealed court records that could only be obtained through an order unsealing the records. *Id.* at 785-86. Litigation ensued, and the trial court agreed with the County that the records could only be obtained by moving to unseal the court file. The trial court's order did not directly address billing records held by non-judicial County entities. *Id.* at 788-790.

This Court reversed. After re-affirming its earlier decision that judicial records are governed by court rules and not the PRA, *id.* at 792-98, the Court squarely rejected the argument that an order to seal court records prevented disclosure of the same records under the PRA.

... Absent a protective order or other instructions specifically limiting disclosure of judicial documents sent by the court to outside entities, we hold that such documents are no longer judicial documents and hence disclosure is governed by the PRA. (Emphasis added).

Id. at 805. The Court further held that the order to seal the court records was not a proper basis for enjoining the release of public records held by other agencies under the PRA. "As to records, if any, held by entities outside the court, we agree with the newspaper that the court erred by treating these records as sealed court records and on that basis the injunction was improper." *Id.* at 807.

Like the order to seal the billing records in *Yakima County*, the order to seal the *Lerud* file only applies to the documents in the court file

itself. CP 63. No protective order or PRA injunction was ever issued in *Lerud*. Consequently, Koenig's request for records from the prosecutor is governed by the PRA. *Yakima County*, 170 Wn.2d at 810. Koenig is not attempting to "circumvent" the order to seal the *Lerud* file, as the ACLU erroneously suggests. *See ACLU Br.* at 19. Koenig merely seeks to enforce the PRA as that statute has been interpreted by this Court.

In *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), *Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009), and *Yakima County*, this Court has carefully distinguished between access to agency records under the PRA and access to judicial records pursuant to court rules. The Court has rejected the efforts of agencies, requesters, and third parties to blur the distinction between judicial records and records governed by the PRA. Yet the ACLU and WDA do not address any of these cases. Those amici provide no authority or analysis to support their erroneous assumptions that anything in a sealed court file must also be private for purposes of the PRA.

The ACLU's unsupported policy arguments regarding "redundant effort," "inconsistent determinations," and "collateral attack[s]" ignore the analytical distinctions between agency records and court files that this Court has established. *ACLU Br.* at 19-20. As Koenig has explained, there are also critical differences between court files and documents in the

possession of an agency. CP 203; *Reply Br.* at 15. In the absence of an order to seal a court file, documents in a court file are immediately available to the public without notice to other parties. In contrast, an agency may seek judicial review and/or provide notice to interested parties before releasing records. RCW 42.56.540, -.550. Records held by agencies can be redacted to prevent the disclosure of exempt information. Like the County, the ACLU simply ignores these distinctions.

In sum, the arguments of the ACLU and WDA are meritless. The order to seal the *Lerud* court file has no effect on Koenig's PRA request.

B. The ACLU and WDA ignore the legitimate public interest in the criminal justice system.

Under RCW 42.56.240(1), investigative records¹ may be exempt under either of two alternative prongs: (i) the nondisclosure of the records is essential to effective law enforcement, or (ii) the disclosure would violate a person's right to privacy. The arguments of WDA and the ACLU focus on the second prong: whether the VIS and/or SSOSA evaluation are private and therefore exempt.

¹ Koenig has assumed, *arguendo*, that the SSOSA evaluation is an investigative record for purposes of RCW 42.56.240(1). CP 94; *App. Br.* at 29. However, it is important to note that amici curiae Allied Daily Newspapers of Washington and other media organizations argue that the SSOSA evaluation is *not* an investigative record at all. *Allied Daily Newspapers Amicus Br.* at 2-6. Although this is an issue raised only by amici curiae, the media amicus brief clearly has the better argument.

The VIS and/or SSOSA evaluation are private for purposes of the PRA “only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, *and* (2) is not of legitimate concern to the public.” (Emphasis added). RCW 42.56.050.² While it is undisputed that the disclosure of information relating to sex crimes would be highly offensive to a reasonable person,³ the amici ignore the legitimate public interest in the criminal justice system.

The public’s interest in the criminal justice system is neither illegitimate nor unreasonable. *Koenig v. Des Moines*, 158 Wn.2d 173, 187, 142 P.3d 162 (2006). In that case, the Court held that the public’s interest in criminal justice was not outweighed by the harm of disclosing the sexually explicit details of a crime involving a minor. *Id.* Furthermore, the public’s legitimate interest in the criminal justice system

² The ACLU cites *Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 2d 199, 213, 189 P.3d 139 (2008) and *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 706, 24 P.3d 390 (2001), for the basic proposition that information about sexual relations implicates the right to privacy. *ACLU Br.* at 11-12. Koenig has never argued otherwise. The issue in this case is whether the disclosure of such information *violates* the right to privacy under RCW 42.56.240(1).

³ The ACLU devotes four pages of its brief to the obvious and undisputed proposition that the disclosure of details of sexual history and sexual abuse would be highly offensive to a reasonable person. *ACLU Br.* at 10-14. Koenig has never argued otherwise, and Koenig has assumed that the disclosure of the SSOSA evaluation would be highly offensive to a reasonable person. *App. Br.* at 29. The VIS is not in the record, and the ACLU simply assumes that the VIS in a voyeurism case contains highly offensive sexual information. If the VIS contains such information, and if that information is not of legitimate interest to the public, then that information may be redacted. *See* section C.

includes the details of crimes that are found in raw investigative records, *id.* at 185-87, even though such details may never be presented in court.

This legitimate public interest in the criminal justice system extends to a VIS and SSOSA evaluation because these documents directly affect the sentence a defendant receives. This is confirmed by published opinions that openly discuss the content of a VIS and/or SSOSA evaluation. *See State v. Gregory*, 158 Wn.2d 759, 850, 147 P.3d 1201 (2006); *State v. Osalde*, 109 Wn. App. 94, 96-97, 34 P.3d 258 (2001); *State v. Bankes*, 114 Wn. App. 280, 284, 57 P.3d 284 (2002); *State v. Sims*, 171 Wn.2d 436, 439-440, 256 P.3d 285 (2011). Like the County, the ACLU and WDA simply ignore the fact that such details are openly discussed in our public, transparent justice system.

Koenig has repeatedly explained that both a VIS and SSOSA evaluation must contain information of legitimate interest to the public. The VIS likely contains a statement by the victim about the sentence Lerud should have received and/or whether he should receive a SSOSA. *See App. Br.* 38; *Reply Br.* at 10, 23; *Cross-Petition* at 16. By statute, the SSOSA evaluation must assess the defendant's amenability to treatment and risk to the community, and propose a treatment plan, including type and length of treatment, monitoring plans, and crime-related prohibitions. RCW 9.94A.670(3); *see App. Br.* at 39-40; *Reply Br.* at 24.

Like the County, both the ACLU and WDA completely ignore the non-exempt information that a VIS and SSOSA evaluation must contain. While WDA opposes disclosure of a SSOSA evaluation, the amicus brief avoids any discussion of the actual content of a SSOSA evaluation. The ACLU speculates that the VIS may contain various information unrelated to the defendant or the crime, but ignores the obvious point that a VIS should contain the victim's opinion on the sentence the defendant should receive. *ACLU Br.* at 3, 12. The ACLU notes that the SSOSA may contain sexually explicit information about the defendant, including prior abuse, fantasies, other crimes, use of pornography, and/or the results of plethysmography.⁴ *Id.* at 5-6, 12. But the ACLU erroneously assumes, contrary to *Koenig v. Des Moines, supra*, that such information is not of legitimate interest to the public. The ACLU cannot explain why such information would be in a SSOSA evaluation if it were not relevant to whether the defendant is amenable to treatment and/or dangerous.

In sum, the ACLU and WDA completely ignore the legitimate public interest in the criminal justice system. Both the VIS and SSOSA

⁴ The ACLU asserts that the SSOSA evaluation contains "privileged medical and psychological reports." *ACLU Br.* at 14. This misleading characterization of the SSOSA evaluation was drafted by the prosecutor in the order to seal the *Lerud* file, and was carelessly repeated by the Court of Appeals in its discussion of the facts. CP 63; 155 Wn. App. at 401-02. There is no claim or showing that anything in the SSOSA evaluation is "privileged." The terms "medical" and "psychological" erroneously imply that a SSOSA evaluation constitutes health care. *See* section E.

contain information about the criminal justice system that the public has the right to know. To the extent those records contain some exempt information, that information must be redacted and the rest disclosed.

C. The ACLU and WDA ignore the well-established rule that records must be redacted rather than withheld in their entirety.

This Court has repeatedly held that agencies may not withhold entire documents but must redact any exempt information and then disclose the rest of the document. *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994); *Prison Legal News v. Dep't. of Corr.*, 154 Wn.2d 628, 646-47, 115 P.3d 316, (2005); *Koenig v. Des Moines*, 158 Wn.2d at 183-87, *Bellevue John Does*, 164 Wn.2d at 206. This Court has rigorously enforced the PRA's redaction requirement even where redaction would not actually conceal a person's identity. *Bainbridge Is. Police Guild v. Puyallup*, ¶¶ 28-29, ___ Wn.2d ___, ___ P.3d ___ (August 18, 2011). The ACLU and WDA have completely ignored the long-standing and well-established redaction requirement.

It is not necessary — or even appropriate — for this Court to conclude that the VIS or SSOSA evaluation must be produced in their entirety. Rather, this Court only needs to reverse the lower courts and remand this case for compliance with the redaction requirement. In addition, this Court should consider overruling *Cowles Publ'g Co. v.*

Pierce County Prosecutor's Office, 111 Wn. App. 502, 45 P.3d 620 (2002), as that case clearly violates the PRA's redaction requirement and decisions of this Court that have enforced that requirement.

With respect to *Cowles Publ'g Co.*, WDA has missed Koenig's point completely. *Cowles Publ'g Co.* is one of four cases, including this case, in which Division II has summarily dismissed and violated the PRA redaction requirement. *Cross-Pet. Rev.* at 18. In response to the amicus memorandum previously filed by WDA, Koenig argued, *inter alia*, that *Cowles Publ'g Co.* should be overruled or abrogated ***on the issue of redaction***. *Answer to Br. of Amicus Curiae* at 2-4. Koenig's supplemental brief was unambiguous on this same point. *Supp. Br.* at 13.

In *Cowles Publ'g Co.*, a newspaper requested the "mitigation package" submitted by a defendant in an effort to persuade the prosecutor not to seek the death penalty. 111 Wn. App. at 505. The mitigation package "consist[ed] mainly of information about Yates' family ... describ[ing] each family member and how each would feel if Yates were sentenced to death." *Id.* at 510. After concluding that the mitigation package was an investigative record for purposes of RCW 42.56.240(1) (former RCW 42.17.310(1)(d)), the Court of Appeals held that the mitigation package was exempt under both prongs of RCW 42.56.240(1). *Id.* at 510-11. The court further held that the mitigation package was not

susceptible to redaction because it “consist[ed] almost exclusively of information and photos about [defendant Yates’s] family.” *Id.* at 511.

While *Cowles Publ’g Co.* is easily distinguishable based on the type of records at issue in that case (information about the defendant’s family), the analysis of redaction in that case is clearly wrong. Consequently, Koenig has argued that *Cowles Publ’g Co.* should be overruled *on the issue of redaction*. *Supp. Br.* at 13. Unfortunately, WDA, like the ACLU, has failed to address the issue of redaction.⁵

This Court should avoid speculating about what parts of the VIS and SSOSA evaluation, if any, should be redacted. Indeed, the Court of Appeals already made that mistake. *See Cross-Petition* at 17-18. The VIS and SSOSA evaluations are not in the record, which precludes the review suggested by the ACLU. *ACLU Br.* at 11. The parties have not briefed the question of what specific information, if any, should be redacted. And before that can occur, the County must explain how specific exemptions apply to particular parts of the VIS and SSOSA. RCW 42.56.210(3); *Sanders v. State*, 169 Wn.2d 827, 846-48, 240 P.3d 120 (2010).

⁵ Instead, WDA devotes two full pages of its amicus brief to arguing that the SSOSA evaluation is an “investigative record” for purposes of RCW 42.56.240(1). *WDA Br.* at 5-7. Koenig has never argued otherwise, but merely assumes, *arguendo*, that the SSOSA is an investigative record. It is not necessary for the Court to decide that issue in this case. *See* Section B. As explained in Section D (below), the question of whether “defense mitigation materials” are also investigative records is not presented in this case.

Koenig requests that this case be remanded to the trial court (i) for *in camera* review, if needed, (ii) to order the County to produce the records, subject to redaction, and (iii) to address any claims by the County that particular portions of the VIS and/or SSOSA are exempt. That is exactly what this Court ordered in *Yakima County*, 170 Wn.2d at 808-09.

D. The Court should reject WDA's efforts to create a new PRA exemption for "defense mitigation material."

WDA continues to argue that the SSOSA evaluation constitutes "defense mitigation materials," and that any such records should be exempt from public disclosure. *WDA Br.* at 5-8. This argument should be rejected for several reasons. First, the County has never argued that the SSOSA is exempt as "defense mitigation materials." This Court does not address issues raised only by amici. *Madison*, 161 Wn.2d at 104 n.10.

Second, WDA's argument is based on an overly-broad interpretation of *Cowles Publ'g Co.*. That case addressed one particular type of record: the defendant's mitigation package in a death penalty case. The Court of Appeals held that this particular record was exempt because (i) the prosecutor had a duty to make an individualized decision to seek the death penalty, and (ii) the record consisted almost entirely of information about the defendant's family. 111 Wn. App. 509-511. These holdings were *not* based on the desires of the defense bar to engage in plea

bargaining away from the prying eyes of the public. Yet WDA seeks to expand the narrow holding(s) in *Cowles Publ'g* to create a sweeping PRA exemption for anything provided to a prosecutor by the defendant. WDA's plea for secret communications with prosecuting attorneys violates the PRA's requirement that disclosure provisions must be liberally construed and exemptions narrowly construed. RCW 42.56.030.⁶

Third, nothing in the record supports the assertion that the *Lerud* SSOSA evaluation was provided by the defendant as opposed to being ordered by the sentencing court. The prosecutor's declaration is vague as to the origin of the SSOSA evaluation. CP 106. The declaration of Amy Muth, on which both the County and WDA heavily rely, states "**Once the court determines that an individual is eligible to receive a SSOSA, the court will order that the individual submit to a psychosexual evaluation.**" CP 110. This part of Muth's declaration is notably absent from the lengthy quotations in the County's briefs as well as the WDA brief. *Resp. Br.* at 29, 30-31; *Pet. Review* at 9, 15-17, 19; *WDA Br.* at 3.⁷

⁶ WDA notes that a SSOSA evaluation provided by the defendant during negotiations under ER 410 cannot be used by the state in its case-in-chief. *WDA Br.* at 4. That is irrelevant for purposes of the PRA. ER 410 is merely an evidence rule that prevents certain evidence from being admitted in a trial. ER 410 is not a PRA exemption or an "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). Nor has the County argued otherwise.

⁷ After ignoring *State v. Bankes*, 114 Wn. App. 280, in the Court of Appeals and in its petition for review, the County's supplemental brief attempts to distinguish *Bankes* based on an unsupported and irrelevant assertion that the *Lerud* SSOSA evaluation was not

Fourth, there is no legal basis for WDA's characterization of a SSOSA evaluation as "defense mitigation materials." RCW 9.94A.670(3) plainly states that a SSOSA evaluation is ordered by "the court, on its own motion or the motion of the state or the offender." A SSOSA evaluation is prepared for the court, not the defendant. In *Bankes*, *supra*, the court upheld a trial court's order to disclose an unfavorable SSOSA evaluation. "[The SSOSA statute] contemplates that the court will order an evaluation, that the report will be made available to the court, and that the court will use it to determine whether the defendant *and the community* will benefit from the alternative sentencing option." *Bankes*, 114 Wn. App. at 287. Unlike the SSOSA evaluation in *Bankes*, the SSOSA evaluation in this case was actually used to issue a SSOSA sentence.⁸

E. The SSOSA evaluation is not "health care" for purposes of Chapter 70.02 RCW.

As a threshold matter, this Court should refuse to consider whether a SSOSA evaluation constitutes health care information under Chapter

ordered by the court. *Supp. Br.* at 3. The County's assertion that Koenig "knows" that the court did not order the SSOSA evaluation is simply false. *Id.*

⁸ Attempting to distinguish *Bankes*, WDA argues that "nothing in the statute prohibits the parties from furnishing an evaluation to the court, absent an order to do so, to request SSOSA." *WDA Br.* at 4 n.1. That is irrelevant. Once the SSOSA evaluation was provided to the prosecutor it became a public record under the PRA. While the issue is not presented in this case, nothing in RCW 9.94A.670(3) suggests that the defendant has the right to claw back an unfavorable SSOSA evaluation after it has been submitted to the prosecutor or the court.

70.02 RCW. The County first raised the issue in the Court of Appeals, citing only the policy statement in RCW 70.02.005, but providing no meaningful legal analysis. *Resp. Br.* at 28. After the court dismissed the County's undeveloped argument, 155 Wn. App. at 418, the County devoted its entire *Motion for Reconsideration* to this theory. The court denied the County's motion without requesting a response from Koenig. The County's petition for review addressed the issue obliquely, citing only the policy statement in RCW 70.02.005 in support of the County's argument that the SSOSA evaluation is private under RCW 42.56.240(1). *Petition* at 18. After review was granted, the County presented its health care argument in its *Supplemental Brief*. As a result, Koenig never had an opportunity to respond to the County's arguments.⁹ Now WDA has raised the health care issue again, blithely ignoring all of the contrary legal authorities previously cited by Koenig in pleadings served on WDA.

1. Chapter 70.02 RCW governs health care providers and patient records, *not* SSOSA evaluations.

Like the County, WDA asserts without any supporting authority that a SSOSA evaluation constitutes "health care information" under Chap. 70.02 RCW. *WDA Br.* at 9-10. A SSOSA evaluation is *not* "health

⁹ Koenig attempted to address the health care issue in his *Motion to Strike Improper Brief*. The Commissioner denied Koenig's motion, but suggested that the Court would decide whether the County had adequately briefed the issue. *Ruling* (May 24, 2011).

care information” because SSOSA is not “health care,” the defendant is not a “patient,” and the County is not a “health care provider.”

In *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 112 P.3d 522 (2005), the plaintiff argued that his former employer had violated Chap. 70.02 by disclosing the results of the plaintiff’s drug test to a subcontractor. The Court of Appeals rejected this claim:

Todd is not a “health care provider,” the results of a drug screening test that Todd requires employees to obtain after an on-the-job injury is not “health care information” and the drug screening test was not administered to Hines as a “patient.” Todd’s drug screening test was a condition of Hines’ employment ...

127 Wn. App. at 366-67. Like the drug test in *Hines*, the purpose of a SSOSA evaluation is *not* diagnosis or treatment of the defendant. The purpose of a SSOSA evaluation is to enable the sentencing court “to determine whether the offender is amenable to treatment.” RCW 9.94A.670(3); *see Bankes*, 114 Wn. App. at 287. Like a drug test, a SSOSA evaluation is not “health care.” *See* RCW 70.02.010(5). The result of a SSOSA evaluation—which may be adverse to the defendant—is not “health care information.” *See* RCW 70.02.010(7).

Second, the criminal defendant for whom a SSOSA evaluation is ordered is *not* a “patient.” *See* RCW 70.02.010(12). Like the plaintiff in *Hines*, the defendant is not a “patient” of either the sentencing court or the SSOSA evaluator. A SSOSA evaluation may be ordered and provided to

the sentencing court without the defendant's consent. RCW 9.94A.670(3); *Bankes*, 114 Wn. App. at 287. A SSOSA evaluator has a duty to report, *inter alia*, the defendant's risk to the community. RCW 9.94A.670(3)(b). Because these procedures are not controlled by the defendant and not for the benefit of the defendant, the defendant is not a "patient" during a SSOSA evaluation. *See also*, RCW 9.94A.670 (sex offender treatment provider may not be the same person who performs SSOSA evaluation).

Third, even if a SSOSA evaluation could be considered "health care information," the restrictions in Chap. 70.02 RCW are not applicable because, like the former employer in *Hines*, neither the sentencing court nor the prosecuting attorney is a "health care provider." *See* RCW 70.02.010(9). RCW 70.02.020 only restricts disclosures by a "health care provider" or an assistant, agent, or employee of a "health care provider." Similarly the exceptions in RCW 70.02.050 only apply to a "health care provider." Because the County is not a health care provider, Chap. 70.02 is simply not applicable. *See Fisher v. Dept. of Health*, 125 Wn. App. 869, 876-77, 106 P.3d 836 (2005); *Hines*, 127 Wn. App. at 369 (same); *see Murphy v. State*, 115 Wn. App. 297, 62 P.3d 533 (2003).

2. Statutes and regulations governing sex offender treatment providers do *not* support the argument that a SSOSA evaluation is "health care information."

Like the County, the ACLU cites RCW 18.155.020 and WAC 246-

930-020 for the proposition that SSOSA treatment providers are health care professionals regulated by the Department of Health (DOH). *ACLU Br.* at 6. Neither of these provisions supports the argument that a SSOSA evaluation is “health care information” for purposes of Chap. 70.02 RCW. It is undisputed that a SSOSA evaluation must be performed by a certified sex offender treatment provider. RCW 18.155.030(2)(a). But the ACLU and WDA carelessly assume that anything such a health professional does must be “health care,” and that any record created by a health professional must be “health care information.” On the contrary, examining a criminal defendant for the benefit of the court is *not* “health care” provided to a “patient.” *See Hines*, 127 Wn. App. at 366-67.

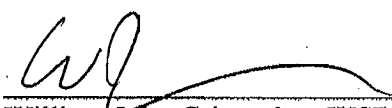
In fact, DOH regulations clearly indicate that a SSOSA evaluation is *not* health care information. Two separate sections of Chapter 246-930 WAC provide specific standards for **evaluation** and **treatment** respectively. WAC 246-930-320, which establishes detailed standards for SSOSA **evaluations** used by courts, contains no provisions for privacy or confidentiality whatsoever. In contrast, WAC 246-930-330, which establishes detailed standards for subsequent **treatment**, requires treatment providers to “maintain and safeguard client files consistent with the professional standards and with Washington state law regarding health care records.” WAC 246-930-330(4). This discrepancy shows that

SSOSA **evaluation** and sex offender **treatment** are not the same thing. The distinction between evaluation and treatment is entirely consistent with the requirement that a treatment provider may not be the same person who performed the SSOSA evaluation. RCW 9.94A.670(13). Whether or not sex offender treatment pursuant to a SSOSA sentence might be considered health care for purposes of Chap. 70.02 RCW, a SSOSA evaluation is *not* health care or health care information.

3. Any health care information in the SSOSA evaluation must be redacted, and Koenig is entitled to an award of attorney's fees.

Even if a SSOSA evaluation were considered health care and the prosecuting attorney is considered a health care provider for purposes of Chap. 70.02 RCW, this case must be remanded to the trial court for further proceedings. First, the County must redact any health care information from the SSOSA evaluation and provide Koenig with a redacted copy. The PRA's redaction requirement applies to records that contain health care information governed by Chap. 70.02. *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 644-47, 115 P.3d 316 (2005). Second, if any part of the SSOSA evaluation is governed by Chap. 70.02 RCW then Koenig is entitled to an award of attorney's fees for the County's failure to identify and explain the applicable exemption in response to Koenig's request for records. *Sanders*, 169 Wn.2d at 847-48.

RESPECTFULLY SUBMITTED this 26th day of September, 2011.



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Certificate of Service

I, the undersigned, certify that on the 26th day of September, 2011, I caused a true and correct copy of this *Answer to Amicus Briefs of The Washington Defender Association, The Washington Association of Criminal Defense Lawyers, and The American Civil Liberties Union* to be served, by the method(s) indicated below, to the following person(s):

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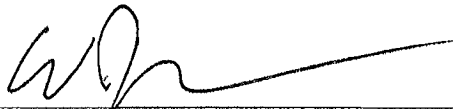
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